

the variance request” shall be substituted for “the date of determination” for the first mention of that term in both § 4204.13 (a)(1) and (a)(2). In addition, in determining the purchaser’s average net income after taxes under § 4204.13(a)(1), for any year included in the average for which the net income figure does not reflect the interest expense incurred with respect to the sale, the purchaser’s net income shall be reduced by the amount of interest paid with respect to the sale in the fiscal year following the date of determination.

(c) *Information required.* A request for a variance shall contain financial or other information that is sufficient to establish that one of the criteria in § 4204.12 or § 4204.13(a) is satisfied. A request on the basis of either § 4204.13 (a)(1) or (a)(2) shall also include a copy of the purchaser’s audited (if available) or (if not) unaudited financial statements for the specified time period.

(d) *Limited exemption during pendency of request.* Provided that all of the information required to be submitted is submitted before the first day of the first plan year beginning after the sale, a plan may not, pending its decision on the variance, require a purchaser to post a bond or place an amount in escrow pursuant to section 4204(a)(1)(B). In the event a bond or escrow is not in place pursuant to the preceding sentence, and the plan determines that the request does not qualify for a variance, the purchaser shall comply with section 4204(a)(1)(B) within 30 days after the date on which it receives notice of the plan’s decision.

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§ 4204.12 De minimis transactions.

The criterion under this section is that the amount of the bond or escrow does not exceed the lesser of \$250,000 or two percent of the average total annual contributions made by all employers to the plan, for the purposes of section 412(b)(3)(A) of the Code, for the three most recent plan years ending before the date of determination. For this purpose, “contributions made” shall have the same meaning as the term has under § 4211.12(a) of this chapter.

§ 4204.13 Net income and net tangible assets tests.

(a) *General.* The criteria under this section are that either—

(1) *Net income test.* The purchaser’s average net income after taxes for its three most recent fiscal years ending before the date of determination (as defined in § 4204.12), reduced by any interest expense incurred with respect to the sale which is payable in the fiscal year following the date of determination, equals or exceeds 150 percent of the amount of the bond or escrow required under ERISA section 4204(a)(1)(B); or

(2) *Net tangible assets test.* The purchaser’s net tangible assets at the end of the fiscal year preceding the date of determination (as defined in § 4204.12), equal or exceed—

(i) If the purchaser was not obligated to contribute to the plan before the sale, the amount of unfunded vested benefits allocable to the seller under section 4211 (with respect to the purchased operations), as of the date of determination, or

(ii) If the purchaser was obligated to contribute to the plan before the sale, the sum of the amount of unfunded vested benefits allocable to the purchaser and to the seller under ERISA section 4211 (with respect to the purchased operations), each as of the date of determination.

(b) *Special rule when more than one plan is covered by request.* For the purposes of paragraphs (a)(1) and (a)(2), if the transaction involves the assumption by the purchaser of the seller’s obligation to contribute to more than one multiemployer plan, then the total amount of the bond or escrow or of the unfunded vested benefits, as applicable, for all of the plans with respect to which the purchaser has not posted a bond or escrow shall be used to determine whether the applicable test is met.

(c) *Non-applicability of tests in event of purchaser’s insolvency.* A purchaser will not qualify for a variance under this subpart pursuant to paragraph (a)(1) or (a)(2) of this section if, as of the earlier of the date of the plan’s decision on the variance request or the first day of the first plan year beginning after the date of determination, the purchaser is the

subject of a petition under title 11, United States Code, or of a proceeding under similar provisions of state insolvency laws.

Subpart C—Procedures for Individual and Class Variances or Exemptions

§ 4204.21 Requests to PBGC for variances and exemptions.

(a) *General.* If a transaction covered by this part does not satisfy the conditions set forth in subpart B of this part, or if the parties decline to provide to the plan privileged or confidential financial information within the meaning of section 552(b)(4) of the Freedom of Information Act (5 U.S.C. 552), the purchaser or seller may request from the PBGC an exemption or variance from the requirements of section 4204(a)(1)(B) and (C) of ERISA.

(b) *Who may request.* A purchaser or a seller may file a request for a variance or exemption. The request may be submitted by one or more duly authorized representatives acting on behalf of the party or parties. When a contributing employer withdraws from a plan as a result of related sales of assets involving several purchasers, or withdraws from more than one plan as a result of a single sale, the application may request a class variance or exemption for all the transactions.

(c) *Where to file.* The request shall be delivered by mail or submitted by hand to Reports Processing, Insurance Operations Department, Pension Benefit Guaranty Corporation, 1200 K Street NW., Washington, DC 20005-4026.

(d) *Information.* Each request shall contain the following information:

(1) The name and address of the plan or plans for which the variance or exemption is being requested, and the telephone number of the plan administrator of each plan.

(2) For each plan described in paragraph (d)(1) of this section, the nine-digit Employer Identification Number (EIN) assigned by the IRS to the plan sponsor and the three-digit Plan Identification Number (PN) assigned by the plan sponsor to the plan, and, if different, also the EIN and PN last filed with the PBGC. If an EIN or PN has

not been assigned, that should be indicated.

(3) The name, address and telephone number of the seller and of its duly authorized representative, if any.

(4) The name, address and telephone number of the purchaser and of its duly authorized representative, if any.

(5) A full description of each transaction for which the request is being made, including effective date.

(6) A statement explaining why the requested variance or exemption would not significantly increase the risk of financial loss to the plan, including evidence, financial or otherwise, that supports that conclusion.

(7) When the request for a variance or exemption is filed by the seller alone, a statement signed by the purchaser indicating its intention that section 4204 of ERISA apply to the sale of assets.

(8) A statement indicating the amount of the purchaser's bond or escrow required under section 4204(a)(1)(B) of ERISA.

(9) The estimated amount of withdrawal liability that the seller would otherwise incur as a result of the sale if section 4204 did not apply to the sale.

(10) A certification that a complete copy of the request has been sent to each plan described in paragraph (d)(1) of this section and each collective bargaining representative of the seller's employees by certified mail, return receipt requested.

(e) *Additional information.* In addition to the information described in paragraph (d) of this section, the PBGC may require the purchaser, the seller, or the plan to submit any other information the PBGC determines it needs to review the request.

(f) *Disclosure of information.* Any party submitting information pursuant to this section may include a statement of whether any of the information is of a nature that its disclosure may not be required under the Freedom of Information Act, 5 U.S.C. 552. The statement should specify the information that may not be subject to disclosure and the grounds therefor.

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